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In the

[redacted]

October Term, 1999

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Nebraska

BRIEF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS,
AMERICAN CORRECTIONAL ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
COUNCIL OF STATE GOVERNMENTS,
AND NATIONAL LEAGUE OF CITIES
AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether violations of the dormant Commerce Clause are actionable under 42 U.S.C. § 1983.

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and organizations throughout the United States. They have a compelling and continuing interest in the issue presented here: whether Commerce Clause violations may be challenged under 42 U.S.C. § 1983. *Amici* and their members do not mean to suggest by this that they wish to evade their responsibilities under the Clause, which historically has been enforced in state court and by means

of injunctive actions brought in federal court; their concern, instead, is that the availability of attorney's fees in Section 1983 litigation may prompt meritless and expensive lawsuits aimed at discouraging creative regulatory and tax initiatives. For these reasons, *amici* submit this brief to assist the Court in the resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Petitioner proposes an extraordinary change in the way that Commerce Clause claims are litigated. Dormant Commerce Clause actions most often are fought out in state courts under state causes of action, as they have been since early in the nineteenth century; the creation of general federal question jurisdiction late in that century also allowed the assertion in federal court of claims for injunctive relief grounded directly on the Commerce Clause. But so far as we are aware, no plaintiff even attempted to use Section 1983 as a cause of action to challenge Commerce Clause violations for more than 100 years after enactment of the statute. Notwithstanding this history, petitioner makes the surprising contention that Section 1983 remedies are essential to effectuate the Clause, candidly acknowledging that his primary interest is in obtaining attorney's fees.

Unfortunately, petitioner's interest in fees has led him to torture the language and history of Section 1983. The centerpiece of petitioner's argument is his assertion that a plaintiff may invoke Section 1983 whenever he has standing to complain of a violation of the Constitution. But the concepts of standing and cause of action are wholly distinct; the Court often has held that Congress did not provide a cause of action to parties who were injured by violations of the Constitution or federal statu-

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

tory law. The Court's decisions therefore indicate that the crucial question here is whether the Commerce Clause secures "rights" within the particular meaning of that term as it is used in Section 1983. There is no need to speculate on this: the Court has made quite clear that the inquiry whether a constitutional or statutory provision secures such "rights" turns, in relevant part, "on whether 'the provision in question was intend[ed] to benefit the putative plaintiff.'" *Wilder v. Virginia Hospital Ass'n*, 110 S.Ct. 2510, 2517 (1990) (citation omitted).

On this, the historical evidence is overwhelming: the Commerce Clause was designed to minimize conflicts between the States and to safeguard federal authority, not to benefit particular individuals who engage in interstate commerce. That comes clear from the debates at the Constitutional Convention and the extensive discussions of the commerce power in *The Federalist*. As a result, this Court repeatedly has explained that the Clause was designed to serve national rather than individual ends, and expressly has indicated that the Clause protects *commerce* rather than the individuals who engage in it. Indeed, the Clause hardly can confer a personal entitlement to trade freely between the States when its plain terms grant Congress the authority to restrict the flow of interstate commerce. It therefore is not surprising that this Court long ago affirmed the judgment that the Commerce Clause does not secure "rights" within the meaning of 28 U.S.C. § 1343(3), Section 1983's jurisdictional counterpart. *Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), aff'd, 305 U.S. 576 (1939).

2. The conclusion that the Commerce Clause does not secure "rights" within the meaning of Section 1983 is confirmed by the statute's legislative history. The proponents of Section 1983 themselves expressly distinguished between provisions of the Constitution that secure "rights" and those that allocate power between the States and the Federal Government; the Commerce

Clause plainly was understood to fall in the latter category.

The propriety of that understanding is made doubly clear by roughly contemporaneous actions of Congress and decisions of this Court. Just four years after passage of Section 1983's predecessor, Congress used considerably broader language in the statute creating general federal question jurisdiction—a statute that, unlike Section 1983's jurisdictional counterpart, had an amount-in-controversy requirement. If petitioner is correct in contending that plaintiffs may rely on Sections 1983 and 1343(3) whenever they have standing to assert violations of the Constitution, the federal question statute would have been unnecessary (and the jurisdictional amount requirement nugatory) from the outset, at least in constitutional litigation. The Court rejected this unlikely conclusion in some of its earliest decisions involving Section 1983's predecessor, holding that cases involving violations of power-allocating provisions "aris[e] under" the Constitution within the meaning of the federal question statute, but do not "secure rights" within the meaning of Sections 1983 and 1343(3). There is no reason for the Court to depart from that conclusion now.

ARGUMENT

VIOLATIONS OF THE COMMERCE CLAUSE ARE NOT COGNIZABLE UNDER 42 U.S.C. § 1983.

Petitioner and its *amici* fundamentally misdirect the inquiry in this case. Needless to say, we wholly agree with petitioner's vigorous assertion (Br. 19, 24) that he has standing to contest violations of the Commerce Clause that cause him injury. And we fully concur with *amicus* American Trucking Associations, Inc. ("ATA"), when it contends (Br. 5-7) that Section 1983 creates a cause of action that may be used to challenge the violation of any "right" that is "secured by the Constitution." But these contentions, in our view, are entirely

beside the point. As this Court's decisions make clear, the crucial question here is whether the Commerce Clause in fact *does* secure "rights" within the particular meaning of that term as it is used in Section 1983. We think it plain that the Commerce Clause does not create such "rights."

A. Federal Constitutional And Statutory Provisions Secure "Rights" Within The Meaning Of Section 1983 Only When They Are Designed For The Special Benefit Of Individuals.

The centerpiece of petitioner's argument is his contention that plaintiffs may invoke Section 1983 whenever they have *standing* to assert a violation of the Commerce Clause. See Pet. Br. 19, 24. But that contention simply disregards the plain language of the statute. Section 1983 does not, in terms, provide a cause of action for the redress of *all* violations of *all* constitutional provisions; instead, it comes into play only when there has been a deprivation of "rights, privileges, or immunities secured by the Constitution and laws."

In contrast, when Congress has wanted to write a statute that is broad enough to encompass all cases or controversies involving violations of the Constitution, it has known how to do so. It did just that (at least for a limited category of suits) in Section 25 of the Judiciary Act of 1789—reenacted just four years prior to the enactment of Section 1983's predecessor—which authorized this Court to hear appeals from decisions of state courts upholding the validity of state statutes that were challenged "on the ground of their being *repugnant to the constitution* * * * of the United States." 1 Stat. 73, 85, as amended by the Act of Feb. 5, 1867, § 2, 14 Stat. 385, 386 (emphasis added), codified at 28 U.S.C. § 1257.[2]

[2] ATA's reliance (Br. 4-5) on the portion of the Judiciary Act, also now codified at 28 U.S.C. § 1257, that authorizes review by this Court in cases where "any title, right, privilege, or immunity"

Congress took an equally broad approach shortly after enacting Section 1983, when it created federal jurisdiction for "all suits of a civil nature at common law or in equity * * * *arising under the Constitution* or laws of the United States." Act of Mar. 3, 1875, § 1, 18 Stat. (Pt. 3) 470 (emphasis added). And it used similarly expansive language in drafting the Declaratory Judgment Act, 28 U.S.C. § 2201 (emphasis added), which provides that, "[i]n a case of actual controversy within its jurisdiction * * * any court of the United States * * * may declare the rights *and other legal relations* of any interested party." But Congress declined to draw Section 1983 in such broad terms.

The Court accordingly has emphasized several times that the reach of Section 1983, while substantial, is limited by its plain language: "'Section 1983 speaks in terms of "*rights*, privileges, or immunities," not violations of federal law.'" *Wilder v. Virginia Hospital Ass'n*, 110 S.Ct. 2510, 2517 (1990), quoting *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444, 448 (1989) (emphasis added by the Court). With this in mind, the Court has drawn a precise test to determine whether any particular constitutional or statutory provision secures such rights. In relevant part, this "inquiry turns on whether 'the provision in question was intend[ed] to benefit the putative plaintiff.'" *Wilder*, 110 S.Ct. at 2517, quoting *Golden State*, 110 S.Ct. at 448. See *Golden State*, 110 S.Ct. at 449; *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 430 (1987); *id.* at 433 (O'Connor, J., dissenting).[3]

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is claimed under the Constitution or federal law, therefore is misplaced. In fact, Commerce Clause claims generally have reached this Court under the clause of the Act cited in the text.

[3] The test for existence of a "right" actually has three parts: "In deciding whether a federal right has been violated, we have considered [1] whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.' * * * [2] The interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' * * * [3] We have also asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff.'" *Golden State*, 110 S.Ct. at 448. See *Wilder*, 110 S.Ct. at 2517; *Wright*, 479 U.S. at 430, 432; *id.* at 432-433 (O'Connor, J., dissenting). The first two prongs of this test are not at issue here. The Court also has made clear that, "even when the plaintiff has asserted a federal right, the defendant may show that Congress 'specifically foreclosed a remedy under § 1983' * * * by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.'" *Golden State*, 110 S.Ct. at 448 (citation omitted). There is no contention that Congress has done so here.

Under this approach, it is not enough that the provision at issue was drafted "with the interests of the general public in mind" and therefore "benefits particular parties only as an incident of the federal scheme of regulation" (*Golden State*, 110 S.Ct. at 450); to maintain a cause of action, the plaintiff must have been one of the provision's "intended beneficiaries." *Wilder*, 110 S.Ct. at 2517-2518. This rule of interpretation, it should be added, applies both to constitutional and to statutory provisions. That is made clear by the plain terms of Section 1983, which treat the Constitution and federal statutory law identically, and by the Court's decision in *Golden State*, which held that the provision of the Constitution at issue—there, the Supremacy Clause—"does not create rights enforceable under § 1983." 110 S.Ct. at 449.

This inquiry into the purposes served by the relevant provision is a familiar one, for "[w]hether a federal statute confers substantive rights is not an issue unique to § 1983 actions." *Wright*, 479 U.S. at 432 (O'Connor, J., dissenting). The first step in determining whether to imply a private right of action under a federal statute, for example, necessarily involves deciding whether the provision "create[s] a federal right in favor of the plain-

tiff," a question that turns on whether the plaintiff is "'one of the class for whose *especial* benefit the statute was enacted.'" *Cort v. Ash*, 422 U.S. 66, 78 (1975) (emphasis in original) (citation omitted). See *Wilder*, 110 S.Ct. at 2526 (Rehnquist, C.J., dissenting).[4] Cf. *Block v. Community Nutrition Institute*, 467 U.S. 340, 346-348 (1984) (applying similar test to determine whether review precluded under the APA). Indeed, at the time of enactment of Section 1983, courts recognized common law rights of action only under those statutes that were enacted for the benefit of special classes of persons. See, *e.g.*, *Hayes v. Michigan Central R.R. Co.*, 111 U.S. 228, 240 (1884); T. Cooley, *Law of Torts* 790 (2d ed. 1888). See generally *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 374-375 (1982).

Petitioner's attempt to equate the existence of a cause of action under Section 1983 with *standing* to assert a violation of the relevant constitutional provision therefore is inconsistent with this Court's decisions. And that conclusion is hardly surprising. As a general matter, of course, the concepts of standing and cause of action are wholly distinct. See *Davis v. Passman*, 442 U.S. 228, 239-240 n.18 (1979). Thus, to give just one related example, a plaintiff who has suffered injury may have standing to attempt implication of a right of action from a federal statute, even if he ultimately is found not to have a cause of action because Congress, in enacting the statute at issue, "was not concerned with the rights of individuals." *California v. Sierra Club*, 451 U.S. 287, 295 (1981). Indeed, in a setting very similar to this one, the Court has made clear that even prudential limitations on standing are more easily overcome than are the require-

[4] As Chief Judge Wald has noted, "where a separate congressionally created cause of action, § 1983, clearly exists, then the focus on whether the statute creates rights is appropriate, and the value of the first *Cort* factor is retained." *Edwards v. District of Columbia*, 821 F.2d 651, 655 n.4 (D.C. Cir. 1987) (opinion of Wald, C.J.).

ments for stating a cause of action; the Court noted that in the first prong of the *Cort* test—which parallels the "right" inquiry under Section 1983—"the Court was requiring more from the would-be plaintiffs * * * than a showing that their interests were arguably within the zone protected or regulated by [the statute]." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 400-401 n.16 (1987).[5]

Similar problems inhere in the more sophisticated but related argument offered by ATA, which suggests that petitioner is entitled to invoke Section 1983 because plaintiffs may seek injunctive and declaratory relief directly under the Constitution to remedy violations of the Commerce Clause. ATA Br. 13-14, citing *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 400 (1971). In fact, "[s]tatutory rights and obligations"—the type of rights created by Section 1983—"are established by Congress, and it is entirely appropriate for Congress, in creating those rights and obligations, to determine in addition who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. at 241. As the Court made clear in *Wilder* and *Golden State*, Congress has done just that in Section 1983. Indeed, as we explain more fully below (at 26-28), the Court held over a century ago that, while claims grounded directly on the Constitution may be brought into federal court under the broad terms of the statue providing for

[5] The so-called "zone of interest" prudential limitation on standing at issue in *Clarke* may be satisfied by a showing that the plaintiff's claim is "'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" 479 U.S. at 396, quoting *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). Under that test, "there need be no indications of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399-400. The Court applied the test in a state-court action under the Commerce Clause in *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320-321 n.3 (1977).

general federal question jurisdiction, Commerce Clause claims may not be asserted under the narrower provisions of Section 1983's predecessor. This is only logical; there is no reason to suppose that actions grounded directly on the Constitution to enjoin unconstitutional state conduct, on the one hand, and congressionally created actions for money damages, on the other, must be identical in scope.

B. The Commerce Clause Does Not Secure "Rights" With The Meaning Of Section 1983.

Against this background, the extensive argument by petitioner (Br. 15-16) and ATA (Br. 5-7) that Section 1983 safeguards all federal "rights" plainly is circular, since it begs the question whether the Commerce Clause secures "rights" within the meaning of the statute. That question must be answered by looking to whether individuals like petitioner are "intended beneficiaries" of the Clause. *Wilder*, 110 S. Ct. at 2517-2518. And on this, the historical evidence is overwhelming: the Clause was designed to minimize conflicts between the States and to safeguard federal authority, not to benefit particular individuals who engage in interstate commerce. "It is elementary to show that the framers had no personal rights focus when writing the commerce clause. * * * The framers' concern with economic union arose from conflicts among the states and problems of foreign trade, not from disputes between the states and individual merchants." Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U.L. Rev. 43, 46 (1988).

1. At the outset, the Commerce Clause plainly does not confer an entitlement, personal to the individual, to trade freely between the States; it does not, after all, "limit the authority of *Congress* to regulate commerce among the several States as it sees fit," or detract from Congress's authority to "'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Western & Southern*

Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 652 (1981) (emphasis in original), quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). Instead, like many of the other provisions of Article I of the Constitution, the Commerce Clause was designed to allocate regulatory authority "between the national and the state governments" (*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945)), reflecting what Chief Justice Marshall described as "the deep and general conviction, that commerce ought to be regulated by Congress." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827). Like the Supremacy Clause—and unlike the statutory provision at issue in *Golden State*—the Commerce Clause thus is "designed * * * to answer the question whether state or federal regulations should apply to certain conduct." *Golden State*, 110 S. Ct. at 451-452. And it emphatically is not "akin to a rule that denies either sovereign the authority to abridge a personal liberty." *Ibid.* See *id.* at 455 (Kennedy, J., dissenting) (there is no "right" within the meaning of Section 1983 when a federal statute "permits the [plaintiff] to object only that the wrong sovereign has attempted to regulate its [activities]").[6]

The origins of the Clause confirm that it was not designed to create personal entitlements. It is generally agreed that, in the pre-constitutional period, the States regularly used imposts as commercial weapons against one another, while the Nation as a whole was unable to respond effectively to discriminatory trade regulations adopted by other countries. See Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn L. Rev. 432, 448-449, 465-469

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[6] The disagreement between the majority and the dissent in *Golden State* did not go to the proper interpretation of Section 1983; it turned, instead, on the narrow question whether particular provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, secure "rights." Compare 110 S.Ct. at 450-452 with *id.* at 453, 455 (Kennedy, J., dissenting).

(1941). Both of these themes were explored at length—and offered as the sole rationales for giving Congress the authority to regulate commerce—by Hamilton and Madison in *The Federalist*, which offers by far the fullest contemporary account of the genesis of the commerce power. See Abel, *supra*, 25 Minn. L. Rev. at 473.

In exploring the powers that should be conferred on the Federal Government, Hamilton posed the question, "what inducements could the States have, if disunited, to make war upon each other?" *The Federalist* No. 7, at 60 (Mentor ed. 1961) (hereinafter cited as "*Federalist*"). His answer, in part, was that "[c]ompetitions of commerce would be [a] fruitful source of contention. * * * Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. * * * The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars." *Id.* at 62-63. See also *Federalist* No. 6, at 54 (listing "rivalships and competitions of commerce" among "[t]he causes of hostility among nations"). Hamilton expanded on this concern in *Federalist* No. 22, explaining that

> [t]he interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

Id. at 144-145.[7]

[7] Hamilton's remark that States might come to treat citizens of other States like "foreigners and aliens," cited by ATA (Br. 19),

For his part, Madison listed the Commerce Clause among the powers "which provide for the harmony and proper intercourse among the States," explaining that leaving regulation of commerce to the States "would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility." *Federalist* No. 42, at 267, 268. Indeed, some years later Madison declared that "it is very certain that [the Commerce Clause] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice *among the States themselves.*" 3 *The Records of the Federal Convention of 1787*, at 478 (M. Farrand ed. 1937) (letter from J. Madison to J.C. Cabell, Feb. 13, 1829) (emphasis added). See also *id.* at 547-548 (Madison's Convention notes indicating that "want of a general power over Commerce * * * engendered rival, conflicting and angry regulations").

The other element motivating inclusion of the Commerce Clause in the Constitution was the conviction that federal control over commerce would strengthen both the Nation's international position and the strength of its domestic economy, which in turn would assist foreign commerce. The absence of federal supervision over commerce, Hamilton explained, "has already operated as a bar to the formation of beneficial treaties with foreign powers, and has given occasions of dissatisfaction between the States." *Federalist* No. 22, at 144. See *Federalist* No. 11, at 84-89. And Hamilton emphasized the value of free trade for a healthy economy:

> An unrestrained intercourse between the States themselves will advance the trade of each by an

was made during the course of this discussion, immediately after his account of relations among the German principalities. *Federalist* No. 22, at 145. Hamilton's point was that such actions would engender animosity between States, not that individuals should be entitled to favorable treatment for their own sakes.

> interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope from the diversity in the productions of different States. * * * The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions.

Id. at 89-90.

Debate on the Commerce Clause at the Convention was directed largely at the regulation of foreign commerce and navigation. See Abel, *supra*, 25 Minn. L. Rev. at 446-448, 451-459, 465-466, 470. Interstate commerce received remarkably little attention; the most authoritative examination of the debates indicates that the subject appears only nine times in the records of the Convention. See *id.* at 470-471 & nn. 169-175, citing 2 M. Farrand, *supra*, at 308, 360, 361, 418, 441, 451-452, 504, 588-589. And all of these references, like the discussion in *The Federalist*, were directed at the danger of friction and discrimination between States. There was no mention whatsoever of anything resembling an individual entitlement to engage in interstate commerce.

Against this background, it is hardly surprising that the Court has explained the Clause as a response to "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-326

(1979). The grant of regulatory authority to the Federal Government in the Clause was designed to serve national rather than individual ends, the Court indicated, by forestalling this "drift toward anarchy and commercial warfare" that "came 'to threaten at once the peace and safety of the Union.'" *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949) (citation omitted). The Clause thus embodies "the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States." *Wardair Canada v. Florida Dep't of Revenue*, 477 U.S. 1, 8 (1986). See *Brown*, 25 U.S. (12 Wheat.) at 446; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224-225 (1824) (Johnson, J., concurring).[8]

Of course, individuals may benefit from the existence of the national free trade area that, in the absence of restrictive congressional action, is created by the dormant Commerce Clause. But that benefit—in contrast to those conferred by, for example, the Bill of Rights or the Civil War Amendments—is incidental. Indeed, the Court has specifically contrasted the Commerce Clause with one of these latter provisions, explaining that the Commerce

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[8] In *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852), the decision generally cited as the foundation of dormant Commerce Clause doctrine (see *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 370-371 (1976)), the Court grounded its conclusion that the Constitution precludes certain forms of state regulation on the proposition that "[w]hatever subjects of this [commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to have such a nature as to require exclusive legislation by Congress." *Cooley*, 53 U.S. (12 How.) at 319. At other points, the Court has offered slightly varying theories to explain the doctrine: that congressional authority over the regulation of commerce was meant to be exclusive (see, *e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 209; *id.* at 226-239 (Johnson, J., concurring)); or that Congress, by its silence, had indicated its intent to preclude state legislation (see, *e.g.*, *Leisy v. Hardin*, 135 U.S. 100, 109-110 (1890)). All of these theories were premised on the understanding that the Clause was designed to allocate power rather than create individual rights.

and Equal Protection Clauses "perform different functions in the analysis of the permissible scope of a State's power—one protects *interstate commerce*, and the other protects *persons* from unconstitutional discrimination by the States." *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985) (emphasis added) (footnote omitted). This is so, of course, because the Commerce Clause "'protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978). It is clear, then, that "judicial enforcement of such [Commerce Clause] limits on state government at the behest of private parties no more secures an individual right for the purposes of § 1983 than it does in the context of the supremacy clause, or other provisions that allocate power between the states and federal government." Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1550 (1989) (footnotes omitted).

2. In arguing to the contrary, petitioner (Br. 20-21) and ATA (Br. 15-16, 18) point to occasional references in this Court's decisions to a "right" to engage in interstate commerce. But the Court's use of the word "right" in a different context hardly amounts to a determination that the Commerce Clause secures "rights" within the meaning of Section 1983. Indeed, the Court has made clear that violation even of a statute that—unlike the Commerce Clause—*expressly* "speaks in terms of 'rights'" may not be actionable under Section 1983 if those "rights" are not of the sort described by the latter provision. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18 (1981). And the decisions cited by petitioner and ATA, insofar as they discuss the purpose of the Commerce Clause at all, confirm that it was designed to allocate power and assure federal supremacy. See, *e.g.*,

Crutcher v. Kentucky, 141 U.S. 47, 58 (1891); *Gibbons*, 22 U.S. (9 Wheat.) at 209, 210. Otherwise, those decisions stand only for the unexceptionable proposition that the Clause may be asserted in state court, either offensively or (more often) defensively, to challenge state action that is inconsistent with the Constitution.[9]

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[9] See *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977); *Morgan v. Virginia*, 328 U.S. 373, 376-377 (1946); *Edwards v. California*, 314 U.S. 160, 170-173 (1941); *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 48 (1910); *Gibbons*, 22 U.S. (9 Wheat.) at 211. *Cf. Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (dictum). ATA also cites (Br. 18) *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); in fact, however, that decision, which involved the right to travel, rejected the contention that the right could be found in the Commerce Clause and instead implied it from the terms of the Constitution as a whole. See *id.* at 43-49; compare *id.* at 49 (opinion of Clifford, J.) (disagreeing with Court and placing right in the Commerce Clause). The only decision cited by petitioner (Br. 21) and ATA (Br. 15-16) that provides even arguable support for their position is *United States v. Guest*, 383 U.S. 745 (1966), which held that an indictment alleging a conspiracy to deprive citizens of the right to travel stated a violation of 18 U.S.C. § 241, one of Section 1983's criminal counterparts. See 383 U.S. at 757-758. In doing so, the Court observed that "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution" (*id.* at 758), noting at least one prior decision holding that the Commerce Clause protects interstate travel. See *id.* at 758-759, citing *Edwards*. But ATA's suggestion (Br. 15) that the Court "[r]el[ied] principally upon the Commerce Clause" as the source of this right is substantially overstated. To the contrary, the Court also relied on a number of other cases, including *Crandall*, that had not been grounded on the Commerce Clause. See *Guest*, 383 U.S. at 757-758. And the Court concluded that, "[a]lthough there have been recurring differences in emphasis within the Court as to the source of the constitutional right to interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists." *Id.* at 759 (footnote omitted). This is an awfully thin reed on which to hang the proposition that the Commerce Clause generally confers an individual right to engage in interstate commerce. In fact, since deciding *Guest* the Court several times has declined "to ascribe the source of this right to travel interstate to a particular constitutional provision" (*Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (foot-

Relying on *United States v. Munoz-Flores*, 110 S. Ct. 1964 (1990), petitioner (Br. 27-28) and ATA (Br. 17) also contend that particular provisions of the Constitution may have been intended to serve dual purposes by both allocating powers and protecting individual freedoms. Needless to say, we agree: certain provisions may well have been drafted with those two ends in mind. As we explained above, however, the Commerce Clause itself is not such a provision.[10] Certainly, *Munoz-Flores* is of no help to petitioner on this point. That decision concerned an entirely different provision of the Constitution, the Origination Clause of Art. I, § 7, cl. 1. Moreover, as a limitation on the operations of the Federal Government, neither that Clause nor any other separation of powers guarantee ever may be asserted in a Section 1983 action. And in any event, whether separation of powers guarantees secure "rights" of the sort described in Section 1983—an interesting question the answer to

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note omitted)), noting that "[i]t has been variously ascribed to the Privileges and Immunities Clause of Art. IV, * * * to the Commerce Clause, * * * and to the Privileges or Immunities Clause of the Fourteenth Amendment." *Attorney General v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality opinion). See *id.* at 920 (O'Connor, J., dissenting) (placing right in the Privileges and Immunities Clause of Art. IV, § 2). The Court has since cited *Guest* as standing for the proposition that the right may be "inferred from the federal structure of the government adopted by our Constitution." *Id.* at 902 (plurality opinion).

[10] Of course, the Commerce Clause—like every other provision of the Constitution and every public law—ultimately was written "with the interests of the general public in mind." *Golden State*, 110 S.Ct. at 450. But that sort of global purpose plainly does not create "rights" within the meaning of Section 1983. See *ibid.*; *Sierra Club*, 451 U.S. at 295 (finding first prong of *Cort* test not satisfied when the statute at issue was "designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce" and "was not concerned with the rights of individuals"). The Court necessarily held as much in *Golden State* when it concluded that the Supremacy Clause does not secure "rights" under Section 1983.

which is by no means apparent—is wholly beside the point in a case that turns on the meaning of the Commerce Clause.[11]

Indeed, when it has addressed the issue directly, the Court rejected the contention that the Commerce Clause creates "rights" within the meaning of Section 1983. In *Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), aff'd, 305 U.S. 576 (1939), the plaintiff, asserting a Commerce Clause violation, attempted to premise federal jurisdiction on, among other provisions, the predecessor to 28 U.S.C. § 1343(3), Section 1983's jurisdictional counterpart.[12] A three-judge district court held itself without jurisdiction to hear the case, explaining that, "while there is an allegation about the [state] statute's interfering with interstate commerce, it is clear that there is no claim or evidence that said [state] statute deprives the petitioner 'of any right, privilege, or immunity, secured by the Constitution of the United

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[11] Petitioner (Br. 28) and ATA (Br. 17-18) also rely on *Davis v. Michigan Dep't of Treasury*, 109 S.Ct. 1500, 1507 (1989). But the Court's holding there—that plaintiffs may take advantage of the intergovernmental immunity doctrine in a state cause of action—hardly amounts to a conclusion that the doctrine creates "rights" within the meaning of Section 1983. To the contrary, Justice Kennedy, author of the Court's opinion in *Davis*, has made clear that, "[f]rom the earliest cases interpreting our constitutional law to the most recent ones, we have acknowledged that a private party can assert an immunity from state or local regulation on the ground that the Constitution or a federal statute, or both, allocate the power to enact the regulation to the National Government, to the exclusion of the States." *Golden State*, 110 S.Ct. at 452 (Kennedy, J., dissenting). But "[t]he injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system." *Id.* at 453.

[12] Section 1343(3) is in relevant part identical to Section 1983, giving the district courts jurisdiction to entertain claims asserting the deprivation "of any right, privilege, or immunity secured by the Constitution of the United States * * *." See *Golden State*, 110 S.Ct. at 449 n.4.

States * * *.'" 25 F. Supp. at 938. On appeal, this Court found the issue sufficiently clear that it affirmed the judgment summarily. 305 U.S. 576. And in subsequent years a substantial majority of the courts to address the issue—including four federal courts of appeals [13] and the highest courts of New Hampshire, Georgia, Maine, and New Jersey [14]—have held that violations of the Commerce Clause are not cognizable under Section 1983. There is no reason for the Court to revisit the issue now.

C. The Legislative History Of Section 1983 Confirms That Power-Allocating Provisions Of The Constitution Do Not Secure "Rights" Within The Meaning Of The Statute.

1. Our reading of Section 1983 draws substantial support from the statute's legislative history. While the congressional debates were largely directed at the question of federal power to enact the Civil Rights Act of 1871, Section 1 of which was the predecessor to Section 1983,

[13] See *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144-1145 (8th Cir.), cert. denied, 469 U.S. 834 (1984); *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989); *Pesticide Public Policy v. Village of Wauconda*, 622 F. Supp. 423, 435-436 (N.D. Ill. 1985), aff'd, 826 F.2d 1068 (7th Cir. 1987); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985). While two courts of appeals have permitted Commerce Clause claims to proceed under Section 1983, their discussions of the issue were, at best, conclusory. *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980). Although the issue was briefed before this Court when it considered the Eleventh Circuit's decision in *Continental Illinois Corp. v. Lewis*, 838 F.2d 457 (11th Cir. 1988), vacated as moot, 110 S.Ct. 1249 (1990), the court of appeals in that case did not expressly address the Section 1983 question.

[14] *Georgia v. Private Truck Council*, 371 S.E.2d 378, 381 (Ga. 1988); *Private Truck Council v. State*, 534 A.2d 13, 18 (N.J. Super. Ct. 1987), aff'd, 544 A.2d 33 (N.J. 1988); *Private Truck Council of America v. State*, 517 A.2d 1150, 1157 (N.H. 1986); *Private Truck Council v. Secretary of State*, 503 A.2d 214, 221 (Me. 1986).

virtually every specific mention of the rights secured by the statute referred to provisions of the Constitution that were intended to protect individuals, such as the Bill of Rights and the Civil War Amendments. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 475-476 (1871) (remarks of Rep. Dawes) (Privileges and Immunities Clause and Bill of Rights); *id.* at App. 84-85 (remarks of Rep. Bingham) (equal protection, first eight Amendments, and "rights of conscience"); *id.* at App. 153 (remarks of Rep. Garfield) (equal protection). See generally *Monell v. New York City Department of Social Services*, 436 U.S. 658, 665, 683-689 (1978).

These "rights of American citizenship" (Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871) (remarks of Rep. Shellabarger)) could hardly have been thought to include an entitlement to engage in interstate commerce; after all, it already was well-established at the time that Congress could restrict such commerce, or could authorize the States to do so. See, *e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 207-208. And while ATA correctly notes (Br. 7) occasional references during the legislative debates to the pre-Bill of Rights Constitution, those references were confined to the one provision of the Constitution of 1787 that was designed for the specific protection of individuals—the Privileges and Immunities Clause of Art. IV, §2.[15] See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess.

[15] ATA suggests (Br. 7) that Representative Cook offered the Contracts Clause as a rights-creating provision during the debates. In fact, however, Representative Cook apparently meant to suggest, not that the Clause itself created rights, but that persons had a right of access to the courts—a subject that was of considerable concern in the southern States during the Reconstruction period. He stated that, "if we had conspired to prevent the clerk of the [state] court from certifying the case [involving the Contracts Clause] to the Supreme Court of the United States, and thus deprived that plaintiff of a right under the Constitution of the United States, we should have been committing an offense against the United States which might be punished by national law." Cong. Globe, 42d Cong., 1st Sess. 486 (1871) (remarks of Rep. Cook). Representative Cook added that "[w]e have the right to so frame

332-333 (1871) (remarks of Rep. Hoar); *id.* at 475 (remarks of Rep. Dawes); *id.* at 575 (remarks of Sen. Thurman); *id.* at App. 69 (remarks of Rep. Shellabarger).[16]

Indeed, the proponents of the Civil Rights Act of 1871 themselves expressly distinguished between provisions of the Constitution that allocate power and those that create individual rights. Thus Representative Shellabarger—who chaired the Committee that drafted Section 1983's predecessor, introduced the bill, and was its floor manager in the House (see *Monell*, 436 U.S. at 665, 669)—explained the distinction:

> Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in the tenth section of the first article, that "no State shall make a treaty," "grant letters of marque," "coin money," "emit bills of credit," &c., relate to the division of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and

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the law that a man shall not be deprived of a hearing in the Supreme Court of the United States in a proper case by unlawful means." *Ibid.*

[16] Indeed, in defining "rights," Members of Congress pointed most often to the protections conferred by the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. In particular, many Members pointed to (and quoted from) Justice Washington's influential opinion in *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,730). See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 334 (remarks of Rep. Hoar) (1871); *id.* App. 69 (remarks of Rep. Shellabarger). See Note, *Development: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1155-1156 (1977). That holding was characterized by different Members in varying ways (see *ibid.*), and others rejected *Corfield* as a guide to the rights protected by the 1871 Act. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. App. 152 (1871) (remarks of Rep. Garfield); *id.* at App. 314 (remarks of Rep. Burchard). But it is clear that *Corfield*—which rejected both a Commerce and a Privileges and Immunities Clause challenge to a state law excluding out-of-state residents from a State's oyster beds (see 6 Fed. Cas. at 552)—does not, and was not understood to, establish a right to engage in interstate commerce.

> as between the States and such persons therein. *These prohibitions upon the political powers of the States are all of such a nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States "enforced" those provisions of the Constitution.* But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.

Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871) (emphasis added). As several courts of appeals have recognized, "the implication of Rep. Shellabarger's statement is that § 1983 was enacted to provide a remedy for the latter category of constitutional violation he mentions, and not the former." *Consolidated Freightways*, 730 F.2d at 1146 n.16. See *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 849 (9th Cir.), cert. denied, 479 U.S. 1060 (1987). See also *Golden State*, 110 S.Ct. at 454 Kennedy, J., dissenting) (Rep. Shellabarger "recognized and explained the distinction").

Representative Shellabarger went on to explain that there were three provisions of the original Constitution that "secure[] the right or the liabilities of persons within the States, as between such persons and the States"—the Privileges and Immunities, Extradition, and Fugitive Slave Clauses of Art. IV, § 2. Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871). He noted that Congress already had enacted legislation that, in one way or another, enforced each of these provisions, "the only three where the rights or liabilities of persons in the States, as between these persons and the States, are directly provided for." *Id.* at App. 69-70. And in defending Congress's authority to enact the Civil Rights Act of 1871, he added:

> I must not * * * be told, as an answer to my argument, that there is no legislation executing those

> other provisions of the Constitution denying powers to the States, as, for example, those providing that no State shall make any law impairing the obligation of contracts or make treaties, and all those similar prohibitions. *The fact that there has been no legislation upon these subjects*, as I have already said, is simply because there has been no need of any. The decision of the Supreme Court of the United States, striking down the State laws which attempted to invade those provisions of the Constitution, ended the State legislation. *But that would not do where personal rights were invaded by the States.*

Id. at App. 70 (emphasis added).

This passage is doubly revealing. It confirms Representative Shellabarger's view that power-allocating provisions of the Constitution do not secure "personal rights." At the same time, Representative Shellabarger made clear his understanding that "there has been no legislation upon these subjects." Yet five years earlier, Congress had enacted the Civil Rights Act of 1866, 14 Stat. 27, which was identical in scope to Section 1 of the Civil Rights Act of 1871, Section 1983's predecessor; the 1871 Act simply added civil remedies to the criminal penalties created in 1866. See Note, *supra*, 90 Harv. L. Rev. at 1155-1156. Representative Shellabarger was aware of this, of course, having himself just described Section 1983's predecessor as being identical in its reach to the 1866 Act. See Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871). He therefore must have been of the view that neither the 1866 Act nor Section 1 of the 1871 Act created a cause of action for violations of power-allocating provisions of the Constitution.[17]

[17] ATA contends (Br. 9-11) that Representative Shellabarger's comments are not probative because they were delivered during his defense of Section 2 of the Civil Rights Act of 1871, rather than as part of his analysis of the companion Section 1, the predecessor of Section 1983. In fact, however, three Justices already have found his remarks an authoritative account of the purposes of Section 1983. See *Golden State*, 110 S. Ct. at 454 (Kennedy, J., dissenting).

This was hardly an idiosyncratic view, as petitioner (Br. 3-34) and ATA (Br. 10-11) contend—which is not surprising, given Representative Shellabarger's leading role in shepherding the bill into law. Representative Hoar, for example, in one of the few express references to the commerce power in the debates, noted that "[t]he powers given to Congress by the Constitution may be classed under two general heads: powers given for the protection of commerce, powers given for the protection and preservation of the fundamental civil rights of man." Cong. Globe, 42d Cong., 1st Sess. 333 (1871). He therefore specifically contrasted "[t]he protection and regulation of commerc[e]" with "the provisions of our Constitution for the protection of personal liberty and civil rights." *Ibid.* Similarly, Senator Trumbull explained that

> when the Constitution of the United States was formed, it was formed for general purposes, for the purpose of establishing a nation with national authority, authority to make war, to conclude peace. to make treaties, to regulate commerce between the States and with foreign governments, and to do various things of a national character; but the protection of the individual citizens was left to the

And they did so with good reason. The version of Section 2 discussed by Representative Shellabarger differed from Section 1 in the remedies it offered rather than the rights it protected: it created criminal penalties for acts "in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States," so long as the acts in question would have been amounted to one of several specified crimes if committed in a place under exclusive federal jurisdiction. See *Monroe v. Pape*, 365 U.S. 167, 180-181 (1961). There is no reason to doubt that the substantive scope of Sections 1 and 2—in particular, the nature of the "rights" they described—were identical. ATA also notes that Representative Shellabarger's remarks were made during his defense of Congress's power to enact Section 2. While correct, this observation is irrelevant: Representative Shellabarger's understanding of the nature of the various provisions of the Constitution, and of the history of congressional attempts to enforce them, surely bears on his understanding of the terms used in the Civil Rights Act of 1871.

> States, except that there is a clause in the Constitution of the United States which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

Id. at 575.

2. This understanding that Section 1983's predecessor could not be used to challenge violations of power-allocating provisions of the Constitution is confirmed by roughly contemporaneous actions of Congress and decisions of this Court. As we note above, just four years after passage of the Civil Rights Act of 1871, Congress created the general federal question jurisdiction for suits "arising under the Constitution or laws of the United States." 18 Stat. (Pt. 3) 470. Congress presumably attributed some significance to its choice of different—and broader—language for the federal question statute than had been used in the predecessors to Section 1983 and its companion jurisdictional provision, 28 U.S.C. § 1343(3). Moreover, while broader in scope than Section 1983, the federal question statute required satisfaction of a jurisdictional amount requirement. If petitioner is correct in contending that plaintiffs may rely on Sections 1983 and 1343(3) whenever they have standing to challenge a violation of the Constitution, the federal question statute would have been unnecessary (and the jurisdictional amount requirement nugatory) from the outset, at least in constitutional litigation. Congress could hardly have intended to establish such a scheme. See Collins, *supra*, 77 Geo. L.J. at 1553-1554.

And from the outset, this Court's decisions made clear that Congress had no such intention. In *Carter v. Greenhow*, 114 U.S. 317 (1885), one of the Court's earliest interpretations of the Civil Rights Act of 1871, the plaintiff attempted to assert a Contracts Clause violation under Section 1983's predecessor, alleging that a state statute impaired his contractual right to pay taxes in state-issued coupons. The Court rejected the claim in language strikingly similar to that used by Representative Shellabarger, stating that the Clause "so far as it can be said to confer upon, or secure to, any person, any individual rights, does so only indirectly and incidentally." *Id.* at 322. The Court added that "[t]he mode in which Congress has legislated in aid of the rights secured by that clause of the Constitution, is * * * by conferring jurisdiction upon the Circuit Courts by the Act of March 3, 1875, ch. 137, 18 Stat. 470, of all cases arising under the Constitution and laws of the United States. * * * Congress has provided no other remedy for the enforcement of this right." 114 U.S. at 322-323. See *id.* at 323.[18] Because the plaintiff in *Carter* was unable to satisfy the federal question statute's jurisdictional amount requirement, his claim was dismissed. See *id.* at 320, 322-323.

At the same time, however, the Court allowed a virtually identical companion case to proceed because it was grounded directly on the Contracts Clause and entered federal court under the federal question statute rather than the predecessor to Section 1343(3); the action was an early version of the type of injunctive suit, drawing its cause of action directly from the Constitution, that the Court later recognized in *Bell v. Hood*. "The present action," the Court explained, "as shown on the face of the declaration, was a case arising under the Constitution." *White v. Greenhow*, 114 U.S. 307, 308

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[18] ATA maintains (Br. 11-12) that *Carter* was decided on a pleading technicality. But there is nothing in the opinion to support this proposition. The Court noted the allegations in the plaintiff's complaint that he had " 'the right under the Constitution of the United States to pay his said taxes to the said defendant in the said coupons and money, and that this right is secured to him by the Constitution of the United States.' " *Carter*, 114 U.S. at 319. As we indicate above, the Court rejected this contention; its holding involved an analysis of the nature of the "right" secured by the Contracts Clause. See Collins, *supra*, 77 Geo. L. Rev. at 1518, 1535 n.221. The portion of Justice Stone's opinion in *Hague v. CIO*, 307 U.S. 496, 527 (1939) (opinion of Stone, J.), relied upon by ATA was directed principally at the meaning of the statutory term "secured by" and not at the substance of the Contracts Clause. Cf. *Golden State*, 110 S.Ct. at 454 (Kennedy, J., dissenting).

(1885). These two cases in combination, as one commentator has noted, effectively read "the federal question statute [to] pick[] up where § 1983 left off." Collins, *supra*, 77 Geo. L.J. at 1519. Cf. *Pleasants v. Greenhow*, 114 U.S. 323, 323-324 (1885).

Of particular importance here, the Court took an identical approach in cases involving the Commerce Clause. In *Bowman v. Chicago & Northwestern Ry.*, 115 U.S. 611, 614-615 (1885), the plaintiff challenged, apparently on Commerce Clause grounds, a state statute that restricted interstate deliveries of liquor. See Collins, *supra*, 77 Geo. L.J. at 1520. When unsuccessful in the lower court, the plaintiff attempted to bring the action to this Court under Rev. Stat. § 699 (1874), one of the jurisdictional counterparts to Section 1983's predecessor that permitted appeals—without a jurisdictional amount requirement—in suits involving deprivations of "any right, privilege or immunity secured by the Constitution"; as in *Carter*, the plaintiff was unable to satisfy the amount in controversy requirement of the general federal jurisdiction statute. See 115 U.S. at 613-615. The Court dismissed the appeal for want of jurisdiction, explaining that "[t]he case may be arising under the Constitution, within the meaning of that term, as used in other statutes, but it is not one brought on account of the deprivation of a right, privilege or immunity secured by the Constitution, within the meaning of this provision." 115 U.S. at 615-616. Yet several years later, the Court permitted an action brought directly under the Commerce Clause when federal jurisdiction was premised on the statute providing for federal question jurisdiction. *Scott v. Donald*, 165 U.S. 58, 72-73, 100 (1897). See Collins, *supra*, 77 Geo. L.J. at 1520-1521.

These decisions offer a persuasive contemporary reading of Section 1983's predecessor. And the distinction they drew remains good law. Indeed, just last Term Justice Kennedy, citing 28 U.S.C. §§ 1331, 2201, and 2202, noted that plaintiffs may seek "declaratory and

equitable relief in the federal district courts through their powers under federal jurisdictional statutes. * * * These statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983." *Golden State*, 110 S. Ct. at 455 (Kennedy, J., dissenting). Petitioner's reading would eliminate the distinctions between these statutes.

D. Allowing Commerce Clause Suits To Proceed Under Section 1983 Would Dramatically Change The Nature Of Commerce Clause Litigation.

We should add that petitioner's approach would lead to a dramatic change in the way that Commerce Clause claims are litigated. In the years prior to the Civil War, of course, Commerce Clause challenges were (in the absence of diversity) fought out in the state courts under state causes of action, and reached this Court on review from those courts. See generally Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U.L. Rev. 1, 3-4 (1985). Most Commerce Clause cases still reach the Court in that way. The creation of general federal question jurisdiction in 1875 also allowed the assertion in federal court of claims for injunctive or declaratory relief grounded directly on the Constitution. But so far as we are aware, no plaintiff even attempted to use Section 1983 as a cause of action to challenge Commerce Clause violations until over a century after enactment of the statute.[19] This Court never has endorsed such a use of Section 1983, and the lower courts, which have started to address the issue only in the last few years, have overwhelmingly rejected it. See notes 13, 14, *supra*.

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[19] Section 1983 was used sparingly for any purpose prior to the Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961). See Note, *supra*, 90 Harv. L. Rev. at 1167-1169. And we are not aware of any decision resting on the proposition that Commerce Clause claims may be brought under Section 1983 prior to *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-1305 (D. Mont. 1975), aff'd on other grounds, 425 U.S. 463 (1976).

Against this background, petitioner's contention (Br. 12-13 & n.8) that Section 1983 remedies—and attorney's fees—are necessary to effectuate the Clause is simply silly. The values protected by the Clause have, in fact, remained healthy for over two centuries without any such cause of action. This case is an illustration of why that is so: petitioner prevailed in state court under a state cause of action on the merits of his Commerce Clause claim, obtaining injunctive relief and entitlement to a refund of the unconstitutional state tax. Pet. App. 30a. Petitioner thus candidly acknowledges (Br. 12) that his principal interest in the Section 1983 action is the prospect of obtaining attorney's fees and costs. In other cases, of course, recourse to Section 1983 in suits of this sort also would mean that plaintiffs could evade the exhaustion of remedies, payment under protest, and similar procedural devices that are essential elements of all state tax systems.[20] In our view, this Court's precedents and the language of Section 1983 should not be tortured to accomplish that result.

CONCLUSION

The judgment of the Nebraska Supreme Court should be affirmed.

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[20] Indeed, given Congress's longstanding respect for the integrity of state tax systems, expressed most clearly in the Tax Injunction Act, 28 U.S.C. § 1341, we think that a compelling case may be made for the proposition that Congress did not mean Section 1983 to disrupt state tax administration. Under the Tax Injunction Act, federal courts may not entertain suits involving challenges to state taxation; even prior to the enactment of the Tax Injunction Act, principles of comity precluded federal courts from entertaining such actions. See *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 107-109 (1981). Petitioner's suit therefore may proceed only if Congress meant Section 1983 to create a remedy that is available exclusively in state courts. That is hardly likely. We accordingly agree with respondents' suggestion (Br. 45-49) that, if the Court finds that the Commerce Clause secures "rights" within the meaning of Section 1983, it should leave open the question how Section 1983 applies in state tax cases.

Respectfully submitted,

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